



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY*

### VALLEY REGIONAL OFFICE

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## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO NORFOLK SOUTHERN RAILWAY COMPANY FOR NORFOLK SOUTHERN RAILWAY COMPANY CULVERT MAINTENANCE – MCINTIRE PARK**

### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Norfolk Southern Railway Company, regarding the Norfolk Southern Railway Company Culvert Maintenance – McIntire Park, for the purpose of resolving certain violations of State Water Control Law and applicable regulations.

### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
5. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
6. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
7. "NSRC" means Norfolk Southern Railway Company, a corporation authorized to do business in Virginia, and its members, affiliates, partners, and subsidiaries. Norfolk Southern Railway Company is a "person" within the meaning of Va. Code § 62.1-44.3.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
10. "Permit" or "Virginia Water Protection Permit" or "VWP Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under §401 of the federal Clean Water Act (33 United States Code ("USC") §1344.
11. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
12. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the , are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

13. "Property" means the tract of land occupied by the railroad line, appurtenant culvert pipe, and associated rights-of-way, located near McIntire Park in the City of Charlottesville, Virginia, owned by Norfolk Southern Railway Company.
14. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
15. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
16. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
17. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
18. "Surface water" means all state waters that are not ground waters as defined in Va. Code §62.1-255.
19. "Va. Code" means the Code of Virginia (1950), as amended.
20. "VAC" means the Virginia Administrative Code.
21. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. Norfolk Southern Railway Company (NSRC), a subsidiary of Norfolk Southern Corporation, owns and operates a railroad system within the Commonwealth of Virginia. The railroad line located at the Property is a class I freight rail line in interstate commerce.
2. NSRC routinely inspects and maintains railroad lines and appurtenant structures to *inter alia*, implement federal rail safety requirements, maintain drainage, and other purposes as provided by law. NSRC operates over approximately 19,500 route miles in 22 states,

including Virginia, and the District of Columbia, and performs maintenance activities, as necessary, throughout its railroad system.

3. On April 4, 2019, DEQ received a report from City of Charlottesville staff of sediment-laden water discharging to an unnamed tributary of Schenks Branch. City staff reportedly observed sediment-laden water approximately 1.75 miles downstream along the unnamed tributary to Schenks Branch, Schenks Branch, Meadow Creek and the Rivanna River. The report indicated that the source of the sediment-laden water was related to maintenance activities along the railroad line at the Property.
4. On April 8, 2019, DEQ staff performed an inspection at the Property. DEQ staff observed the following during the inspection at the Property and downstream in the unnamed tributary to Schenks Branch:
  - a. Maintenance activity on the west side of the railroad tracks to unclog a culvert pipe that leads from the topographically higher McIntire Park, which is owned by the City of Charlottesville. DEQ staff observed evidence of impounded water behind the culvert at the time of the inspection. No construction personnel were present at the Property;
  - b. Unstabilized area with no erosion and sediment controls present at the culvert pipe and along the west side of the railroad tracks in the vicinity of the culvert pipe;
  - c. Unstabilized area with no erosion and sediment controls present on the downstream side of the culvert pipe (east side of railroad tracks), including an access road to access the culvert and stream channel; and
  - d. Impacts, downstream of the railroad culvert, to an unnamed tributary to Schenks Branch due to sediment, measuring 1-4 inches in depth, for approximately 700 linear feet, although it is not clear how much of this sediment preexisted NSRC's work.
5. On April 8, 2019, US Army Corps of Engineers confirmed that the culvert maintenance activities at the Property qualified for a Nationwide Permit 3 for maintenance activities of service structures. The Nationwide Permit 3 was non-reporting for the activities performed at the Property. DEQ provided conditional 401 certification of Nationwide Permit 3 on April 7, 2017. In addition, the Virginia Water Protection program regulation (9 VAC 25-210-10 et seq.) excludes certain activities related to maintenance of serviceable structures from needing a VWP Permit.

DEQ did not authorize the release of sediment from the Property to the unnamed tributary to Schenks Branch outside of the immediate area of maintenance activity, beyond incidental fill that would be expected during maintenance activities. DEQ did not receive notification from NSRC of the discharge to surface waters.

6. On April 19, 2019, DEQ issued NOV No. 2019-VRO-0006 to Norfolk Southern Corporation for violations of State Water Control Law and Regulations. In a response to the NOV on June 19, 2019, Norfolk Southern Corporation identified NSRC as the appropriate corporate entity for the NOV.
7. 9 VAC 25-210-50(A) states that: "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters; withdraw surface water; otherwise alter the physical, chemical, or biological properties of state waters regulated under this chapter and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses."
8. Va. Code § 62.1-44.15:20.A states that: "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: ... conduct the following in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; ... or New activities that cause significant alteration or degradation of existing wetland acreage or functions; or Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."
9. Va. Code § 62.1-44.5.A. states that: "Except in compliance with a certificate, land-disturbance approval, or permit issued by the Board or other entity authorized by the Board to issue a certificate, land-disturbance approval, or permit pursuant to this chapter, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, or other wastes, or any noxious or deleterious substances..."
10. Va. Code § 62.1-44.5.B. states that: "Any person in violation of the provisions of subsection A who discharges or causes or allows (i) a discharge of sewage, industrial waste, or other wastes or any noxious or deleterious substance into or upon state waters or (ii) a discharge that may reasonably be expected to enter state waters shall, upon learning of the discharge, promptly notify, but in no case later than 24 hours the Board, the Director of the Department of Environmental Quality, or the coordinator of emergency services appointed pursuant to § 44-146.19 for the political subdivision reasonably expected to be affected by the discharge. Written notice to the Director of the Department of Environmental Quality shall follow initial notice..."
11. On April 23, 2019, DEQ staff met with NSRC representatives at the Property to observe the conditions at the Property and discuss the necessary corrective actions.
12. On April 25, 2019, EnviroScience Inc., a subcontractor for NSRC, notified DEQ of the installation of temporary BMPs at the Property, including silt fence and filter socks. The corrective measures were placed on April 24, 2019.

13. On April 29, 2019, EnviroScience Inc. returned to the Property and installed additional erosion and sediment controls, including silt fence and straw bales.
14. On May 1, 2019, EnviroScience Inc. staff provided DEQ documentation of site conditions related to the baseball field area at McIntire Park. The City of Charlottesville owns and maintains the baseball field area. The photosheet documented site conditions prior to and immediately following a precipitation event on April 26, 2019. Stormwater from the baseball field area at McIntire Park was directed to an embankment immediately upslope from the Property. The stormwater directed from the baseball field area was creating an erosive condition on the embankment.
15. On May 3, 2019, NSRC submitted a restoration plan to the City of Charlottesville for review.
16. On May 13, 2019, EnviroScience Inc. returned to the Property following precipitation events. Sediment was removed behind a filter sock in the unnamed tributary to Schenks Branch.
17. On July 12, 2019, the restoration plan submitted by NSRC on May 3, 2020 was reviewed by DEQ and found to be consistent with DEQ's guidance and applicable requirements.
18. On August 13, 2019, NSRC installed additional stormwater BMPs at the Property in conjunction with the restoration plan.
19. On August 26, 2019 and September 3, 2019, EnviroScience Inc. submitted a narrative summary of the restoration and photo documentation to DEQ of the installation of corrective measures identified in the approved restoration plan at the Property.
20. On October 16, 2019, EnviroScience Inc. submitted photo documentation to DEQ of the status of the restoration area following a 0.5-inch precipitation event.
21. On November 20, 2019, DEQ staff performed an inspection at the Property. DEQ staff observed that the installed stormwater BMPs held up well and the Property was mostly stabilized. DEQ staff observed sedimentation at the inlet and outlet areas of the NSRC culvert. The sediment was likely attributable to the continuing erosive condition in the embankment leading from the baseball field area at McIntire Park.
22. On January 22, 2020, DEQ staff met via conference call with City of Charlottesville Stormwater and Parks staff to discuss the corrective measures related to stormwater discharges from the baseball field area. The discussions included both temporary and permanent measures to direct stormwater away from the NSRC right of way and culvert.
23. On February 18, 2020, City of Charlottesville staff provided a status update of the proposed stormwater measures at McIntire Park. The City of Charlottesville retained Line + Grade, a civil engineering firm, to assist the City of Charlottesville in the drainage issues at the baseball field area, and to establish a proposed plan of action to correct the

stormwater runoff issues. The preliminary plan included both near-term temporary measures and long-term permanent measures.

24. On August 20, 2020, City of Charlottesville staff provided a status update to DEQ identifying the temporary measures currently in place to direct stormwater away from the NSRC culvert. The temporary measures included installation of silt fence between the baseball field area and the embankment, and plugging of all pipes that discharge towards the NSRC right of way.
25. Based on the results of the April 8, 2019 and April 23, 2019 inspections, the Board concludes that NSRC has violated the State Water Control Law and Regulations, as described in C(3) – C(20) above.
26. DEQ staff inspected the Property on November 20, 2019 and verified that the violations in C(3) through C(20) above, have been corrected.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders NSRC, and NSRC agrees to:

1. Pay a civil charge of \$17,875 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

NSRC shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, NSRC shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of NSRC for good cause shown by NSRC, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.



2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 2007-001499 dated July 28, 2020. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the affected area; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, NSRC admits the jurisdictional allegations and agrees not to contest but does not admit to any findings of fact or conclusions of law contained in this Order. This Order represents a compromise settlement of contested claims and shall not constitute, be interpreted, construed or used as evidence of any admission of liability, law or fact against NSRC.
4. NSRC consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. NSRC agrees not to contest that it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by NSRC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. NSRC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. NSRC shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. NSRC shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days of becoming aware of conditions that are occurring or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;



- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

- 9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
- 10. This Order shall become effective upon execution by both the Director or his designee and NSRC.
- 11. This Order shall continue in effect until:
  - a. the Director or his designee terminates the Order after NSRC has completed all of the requirements of the Order;
  - b. NSRC petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to NSRC.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve NSRC from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

- 12. Any plans, reports, schedules or specifications attached hereto or submitted by NSRC and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
- 13. The undersigned representative of NSRC certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind NSRC to this document.
- 14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

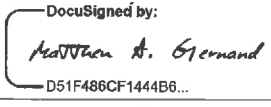
15. By its signature below, NSRC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Amy T. Owens, Regional Director  
Department of Environmental Quality

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Norfolk Southern Railway Company voluntarily agrees to the issuance of this Order.

Date: 11/12/2021 By:  D51F486CF1444B6..., Deputy General Counsel  
(Person) (Title)  
Norfolk Southern Railway Company

Commonwealth of Virginia

City/County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_\_\_\_\_ day of

\_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ who is

\_\_\_\_\_ of Norfolk Southern Railway Company, on behalf of the  
company.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Registration No.

My commission expires: \_\_\_\_\_

Notary seal: